PP

v.

RICHARD DEVADASAN SABARIAH

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CRIMINAL APPEAL NO: A-05-52-2001]
10 JULY 2004

EVIDENCE: *Identification evidence - Poor quality of - No other supporting evidence - Whether safe to convict accused on such poor identification evidence*

EVIDENCE: *Identification parade - Failure of witness to identify accused - Subsequent identification of accused during trial in court - Whether such identification meaningless*

EVIDENCE: *Corroboration - Child witness - Whether unsafe for trial judge to act on uncorroborated evidence of a child*

The respondent was acquitted and discharged on a charge of murder in the High Court. His defence was not called on the ground that the prosecution had not proved the charge against the respondent beyond a reasonable doubt. The prosecution thus appealed. The prosecution had relied on the evidence of three witnesses – PW3 (the wife of the deceased), PW5 (the son of the deceased) and PW8 (a friend of the respondent). Although PW3 testified that she had seen two assailants attacking her husband in her house and she had seen them with uncovered faces for about 5 minutes, she could not identify the respondent as an assailant at an identification parade about one week after the incident. She however identified the respondent as one of the assailants at the High Court trial one and a half years after the incident. This was because, said PW3, the respondent was handcuffed. PW5 was 11 and a half years' of age at the time of the incident and 13 at the time of giving evidence at the trial. Although in evidence he described the attack upon his father, yet he failed to identify anyone at the identification parade. He however identified the respondent as an assailant in the subsequent High Court trial on the basis that the respondent's hair was longer and that he had a moustache at the trial. When it was put to PW5 that the respondent had no moustache, PW5 agreed. PW8 testified that there was a struggle between the deceased and the respondent although there was no mention of such struggle by PW5. PW8 also testified that he had gone to the deceased's house with the respondent at 11pm on the

day of the incident whereas PW3 and PW5 testified that the assault upon the deceased took place at 9pm that day. The main issue before the Court of Appeal concerned the quality of the identification evidence.

Held (dismissing the appeal)

Per Alauddin Mohd Sheriff & Mokhtar Sidin JJCA delivering the majority judgment of the court:

[1] PW3's identification of the respondent could not be relied upon as it was very unsatisfactory. It was very unsafe to convict the respondent on such evidence. PW3's court identification of the respondent was also meaningless. The quality of the identification evidence in the instant case was very poor and as there was no other supporting evidence to connect the respondent with the alleged murder, the Court of Appeal could only say that the learned judge was right in holding that the prosecution had failed to prove its case beyond a reasonable doubt. The order of acquittal and discharge by the learned judge was therefore justified. *R v. Turnbull and Others* [1976] 3 All ER (folld). (p 375 e-f)

[2] The evidence of PW5 – a child of tender years – was never corroborated. It was thus unsafe for the learned judge to act on the uncorroborated evidence of PW5. *Chao Chong & Ors v. PP* [1960] 26 MLJ (folld); *Loo Chuan Huat v. PP* [1971] 2 MLJ 167 (folld). The evidence of PW8 also contradicted the evidence of PW3 and PW 5 and caused the trial judge to doubt which witness was telling the truth. (pp 376 h & 377 a-g)

Per Abdul Aziz Mohamad JCA (dissenting):

[1] What PW5 was in effect saying in evidence was that he recognized the respondent at the trial because his hair was longer and he had a slight moustache. Judging by the notes, it was not the case that PW5 agreed that the respondent had no moustache. What he did agree was that the respondent had no beard, but it was not by the existence of a beard that the witness could recognize the respondent. (p 380 a-d)

[2] There were two aspects to PW8's evidence. One was the fact of his going to the house with the respondent and of the respondent being the person who had a physical engagement with the deceased. The other aspect was the nature of the engagement, what happened during it and what the consequence of it was. If the judge had accepted PW8's evidence as to the first aspect, it should have constituted for him proof to the hilt of the identity of the man whom the son and the mother said hit and kicked the deceased. The judge did not say that he did not accept the witness's evidence in that respect, but that he did not find that it served to connect

the respondent with the incident related by the son and mother. The judge should not have entertained the possibility of a completely different incident and should have accepted the witness's testimony as complete evidence linking the respondent to what had happened to the deceased. (p 381 h)

[3] As to the second aspect of PW8's evidence, the judge should have realized that the witness was a person who had an interest in not telling the truth if it was prejudicial to the respondent, because he was a friend of the respondent's and was involved in accompanying him when he went to carry out his purpose at the deceased's house. His evidence bore the characteristics of the evidence of such a person. (p 382 a-c)

[4] A boy of eleven plus is perfectly capable of observing correctly such an incident as he related, of remembering it and of relating it in court when he is thirteen. According to the judge, the respondent's counsel "emphasized that the evidence of a child must be regarded with suspicion because it is a matter of common knowledge that children at times find it difficult to distinguish *(sic)* between reality and fantasy". It did not appear from his judgment that the judge had any doubt as to PW5's presence in the sitting room at the time of the incident. If he did at all regard PW5's evidence with suspicion, it was his evidence as to what happened at that time. And it did not appear that his suspicion was that PW5 was intentionally not telling the truth, that is to say, that he was lying. If at all he suspected the truth of PW5's evidence, it must have been on a consideration – the fantasy consideration – that PW5, because he was a child, might have perceived things that were not actually happening. It was an unwarranted consideration. The kind of incident that PW5 related was not, considering the circumstances, the kind of incident that is produced by the action of fantasy on an ordinary child's mind from some other incident. (p 383 e-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Di Mahkamah Tinggi, responden telah dilepas dan dibebaskan atas pertuduhan membunuh. Pembelaannya tidak dipanggil kerana pendakwaan dikatakan gagal membuktikan kes mereka di luar keraguan munasabah. Pendakwaan dengan itu merayu. Pendakwaan bergantung kepada keterangan tiga saksinya – PW3 (isteri simati), PW5 (anak lelaki simati) dan PW8 (kawan responden). Walaupun PW3 menyatakan bahawa beliau nampak dua orang telah menyerang suaminya di dalam rumah, dan bahawa beliau dapat melihat mereka selama lima minit dengan muka terdedah, beliau tidak dapat mengecam responden sebagai salah seorang dari penyerang tersebut semasa kawad cam diadakan seminggu selepas

kejadian. Beliau bagaimanapun telah mengecam responden sebagai salah seorang dari penyerang tersebut semasa perbicaraan di Mahkamah Tinggi yang diadakan satu setengah tahun kemudian. Ini kerana, menurut kata PW3, responden telah digari. PW5 berumur 11 1/2 tahun semasa kejadian dan 13 tahun semasa memberi keterangan di perbicaraan. Walaupun dalam keterangannya PW5 menceritakan serangan yang dilakukan ke atas bapanya, beliau juga gagal mengecam sesiapa semasa kawad cam. Bagaimanapun, semasa perbicaraan di Mahkamah Tinggi kemudian, beliau telah mengecam responden sebagai salah seorang dari penyerang berasaskan kepada rambut responden yang lebih panjang serta misai responden. Namun, apabila diajukan kepada PW5 bahawa responden tidak bermisai, PW5 bersetuju. PW8 menceritakan bahawa berlaku pergelutan antara simati dan responden walaupun pergelutan sedemikian tidak disebut oleh PW5. PW8 juga mengatakan bahawa pada hari berlaku insiden beliau dan responden telah pergi ke rumah simati pada jam 11 malam, sementara PW3 dan PW5 menyatakan bahawa serangan pada hari itu berlaku pada jam 9 malam. Isu utama di hadapan Mahkamah rayuan adalah mengenai kualiti keterangan pengecaman.

Diputuskan (menolak rayuan)
Oleh Alauddin Mohd Sheriff & Mokhtar Sidin HHMR menyampaikan penghakiman majoriti mahkamah:

[1] Pengecaman responden oleh PW3 sangat tidak memuaskan dan tidak boleh diambil perhatian. Ianya amat tidak selamat untuk mensabit responden atas keterangan sedemikian. Pengecaman responden oleh PW3 di mahkamah juga tidak memberi apa-apa erti. Kualiti keterangan pengecaman dalam kes semasa adalah amat rendah dan, oleh kerana tiada keterangan lain yang boleh mengkaitkan responden dengan pembunuhan, Mahkamah Rayuan hanya boleh berkata bahawa yang arif hakim betul apabila merumuskan bahawa pendakwaan gagal membuktikan kesnya di luar keraguan munasabah. Perintah pelepasan dan pembebasan yang arif hakim dengan itu adalah berjustifikasi (*R v. Turnbull & Ors* [1976] 3 All ER (diikuti)).

[2] Keterangan PW5 – seorang kanak-kanak yang masih kecil – tidak langsung disokong. Ianya dengan itu tidak selamat bagi yang arif hakim untuk bergantung kepada keterangan PW5 yang tidak disokong itu (*Chao Chong & Ors v. PP* [1960] 26 MLJ (diikuti)). Keterangan PW8 juga bertentangan dengan keterangan PW3 dan PW5 dan ini meletakkan hakim bicara dalam keadaan ragu-ragu saksi mana yang bercerita benar.

Oleh Abdul Aziz Mohamad HMR (menentang):

[1] Apa yang PW5 katakan dalam keterangan adalah bahawa beliau mengecam responden semasa perbicaraan kerana rambutnya lebih panjang dan responden juga menyimpan sedikit misai. Apa yang dipersetujui beliau adalah bahawa responden tidak mempunyai janggut, tetapi kewujudan janggut bukanlah penyebab yang membolehkan saksi mengenali responden.

[2] Keterangan PW8 mengandungi dua aspek. Pertama adalah fakta bahawa beliau telah pergi ke rumah tersebut dengan responden dan bahawa responden adalah orangnya yang bergelut dengan simati. Aspek kedua adalah bentuk pergelutan tersebut, apa yang berlaku di situ dan apakah akibatnya. Jika hakim menerima keterangan PW8 berkaitan aspek pertama, ia sepatutnya menjadi bukti paling kuat kepadanya berkenaan identiti orang yang dikatakan oleh si anak dan ibu sebagai telah menendang simati. Hakim tidak berkata bahawa beliau tidak menerima keterangan saksi mengenai aspek pertama itu, namun beliau gagal merumuskan bahawa aspek itu telah mengkaitkan responden dengan kejadian seperti yang diceritakan oleh si anak dan ibu. Hakim tidak seharusnya melayani kemungkinan wujud insiden yang berlainan sama sekali dan sepatutnya menerima cerita saksi sebagai keterangan penuh yang mengkaitkan responden kepada apa yang berlaku kepada simati.

[3] Tentang aspek kedua keterangan PW8, hakim sepatutnya sedar bahawa saksi tersebut adalah orang yang mempunyai kepentingan untuk tidak berkata benar jika ianya memprejudis responden, kerana beliau adalah kawan responden dan terlibat dalam mengikuti responden apabila responden pergi ke rumah simati untuk melaksanakan niatnya. Keterangan-keterangan mengandungi ciri-ciri bahawa beliau adalah orang yang seperti itu.

[4] Seorang budak lelaki berumur 11 tahun lebih mempunyai keupayaan yang sempurna untuk memerhati dengan betul insiden yang diceritakan, serta mengingati dan menceritakannya di dalam mahkamah ketika berusia 13 tahun. Menurut hakim, peguam responden "menekankan bahawa keterangan seorang budak hendaklah dilihat dengan curiga kerana diketahui umum bahawa kanak-kanak mendapati sukar untuk membezakan antara realiti dan khayalan". Hakim dalam penghakiman ini tidak menunjukkan sebarang keraguan tentang kehadiran PW5 di bilik rehat semasa kejadian berlaku. Jika beliau ada mencurigai keterangan PW5, ianya adalah keterangannya mengenai apa yang berlaku pada waktu itu. Hakim nampaknya tidak mengesyaki bahawa PW5 berniat untuk tidak berkata benar, yakni bahawa dia berbohong. Jikapun hakim mempunyai kesangsian terhadap keterangan PW5, ianya adalah atas satu pertimbangan – pertimbangan khayalan –

bahawa PW5, kerana beliau seorang kanak-kanak, mungkin merasa telah melihat sesuatu yang sebenarnya tidak berlaku. Ini bagaimanapun adalah satu pertimbangan yang tidak wajar. Jenis insiden yang diceritakan oleh PW5, mengambilkira hakkeadaan kes, bukanlah kejadian yang boleh dicetus dari satu kejadian yang lain ke dalam fikiran seorang kanak-kanak normal melalui khayalan.

Case(s) referred to:
Chao Chong & Ors v. PP [1960] 26 MLJ ***(refd)***
Loo Chuan Huat v. PP [1971] 2 MLJ 167 ***(refd)***
PP v. Datuk Hj Harun Hj Idris [1977] 1 MLJ 15 ***(refd)***
R v. Turnbull & Ors [1976] 3 All ER 550 ***(refd)***

Other source(s) referred to:
Sarkar on Evidence, 15th edn, p 231

For the appellant - Nurulhuda Nur'aini Mohd Nor DPP
For the respondent - Gurbachan Singh; M/s Bachan & Kartar

[Appeal from High Court, Ipoh; Criminal Trial No: 45-1-2001]

Reported by Andrew Christopher Simon

JUDGMENT

Alauddin Mohd Sheriff JCA (majority):
The respondent faced a murder charge before the High Court Ipoh. The charge reads as follows:

> Bahawa kamu pada 22.3.2000 jam lebih kurang 9.20 malam di rumah No. 10, Persiaran Buntong Jaya 23, Taman Buntong Jaya, Ipoh, Perak di dalam daerah Kinta, di dalam negeri Perak Darul Ridzuan, dengan niat telah melakukan pembunuhan dengan menyebabkan kematian Nedusulian a/I Katherason K.P. 590314-08-5629. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

At the close of the prosecution's case the learned judge acquitted and discharged the respondent without calling for his defence on the ground that the prosecution had failed to prove the charge beyond a reasonable doubt.

The prosecution relied on the evidence of three important witnesses. They are PW3 (the wife of the deceased), PW5 (the son of the deceased) and PW8 (a friend of the accused).

PW3, in her examination-in-chief stated as follows:

> Semasa saya dalam dapur saya dengar anak perempuan saya menangis dan juga dengar suara suami saya. Bila saya dengar bunyi-bunyi saya sangka suami saya memukul anak saya. Saya pun pergi menghalang pukulan itu. Bila saya sampai di ruang tamu saya melihat suami saya baring atas lantai. Ada 2 orang lelaki di ruang tamu saya. Seorang daripadanya sedang menendang suami saya dan lagi seorang hanya berdiri. Lelaki yang menendang menjerit-jerit kemudian mereka keluar dari rumah saya ... Dia ada satu helmet di tangan beliau. Masa itu saya nampak lelaki itu tendang suami saya, suami saya tidak sedar lagi. Hanya seorang lelaki menendang suami saya. Saya boleh nampak dengan jelas. Jarak dari tempat saya ke tempat mereka adalah lebih kurang 12 kaki bila saya lihat mereka.
>
> Saya ada hadir satu ID parade. Saya tidak cam siapa di ID parade itu. Ini berlaku selepas kejadian.
>
> Saya tidak dapat camkan sesiapa kerana pada masa kejadian orang yang menendang suami saya rambut beliau panjang dan bermisai dan juga ada sedikit janggut. Pada masa ID rambut orang yang menendang suami saya terlalu pendek seperti seorang rekrut. Dia tidak ada misai dan janggut. Atas alasan itu saya tidak dapat cam beliau masa ID. Tetapi hari ini saya boleh cam beliau.

Under cross-examination by the respondent's counsel PW3 stated this:

> Semalam saya ada nampak OKI bergari dan sebab itu saya syakki dia di dalam kes ini. Masa saya keluar dapur saya ada dalam keadaan terkejut. Masa itu kedua anak saya menangis dan menjerit. Semasa saya nampak suami saya terbaring, saya terkejut. Selepas menendang suami saya lelaki itu memakai helmet dan keluar rumah saya. Masa saya nampak mereka melarikan diri, masa adalah singkat sahaja. Hanya dalam sebahagian masa ini sahaja saya nampak muka mereka. Saya juga tidak dapat cam lelaki kedua dalam ID. Juga anak saya tidak cam lelaki kedua ini dalam ID. Masa saya kata saya lihat orang yang tendang suami saya hanya 5 minit dan ini cepat sahaja.

With regard to the evidence of PW3 the learned judge found as follows:

> Beginning with PW3, she said that on 23.3.2000 at about 9.20 p.m. she was in the kitchen of the house. She heard her children crying and upon coming to the living room saw two men, one of them was kicking the deceased who was lying on the floor. She was only 3 feet away from the man who was kicking her husband. The faces of these men were not covered. She saw them for about 5 minutes. But at an identification parade held about a week after this incident she was unable to pick out the accused as the person who was in the house assaulting her husband, and neither could she identify the other person who accompanied him.

> Though this witness did identify the accused in Court during the trial, which was one and a half years after the day of the incident, she admitted that this was because the accused was handcuffed. Such manner of identification is certainly unsatisfactory, rendering it, practically, worthless. This is compounded by the fact that she was unable to recognise the accused at the identification parade just a few days after the incident where her recollection would be more accurate and profound.
>
> For the reasons I am of the opinion that PW3's evidence is insufficient to prove the accused was the person who caused the death of the deceased.

It must be conceded by all that in this appeal the most vital issue to be considered is the identification of the respondent. Was he the person who caused the death of the deceased?

Sarkar on Evidence (15th edn) at p. 231 had this to say:

> Identification in Court. The law is well settled that identification of an accused in court is the substantive evidence of the person identifying and his earlier identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in court (*George v. State of Kerala*, [1998] Cri 2034 at 2042: [1998] I Scale 411 (SC)). Mere evidence of identification for the first time in court is not sufficient to sustain the conviction of the accused (*Ramzan v. State of Maharashtra*, [1998] Cri LJ 3547, 3548 (Bom)). No conviction can be based on identification for the first time in court and that too by a solitary witness. (*Robert Peter Kadam v. State of Maharashtra*, [1998] Cri U 3879, 3881 (Bom)).
>
> Where there was clear evidence to show that the accused persons were shown to the witnesses, the identification of such accused by the witnesses in the court was held to be meaningless (*Shaikh Umar Ahmad Shaikh v. State of Maharasthra*, [1998] Cri LJ 2534 (SC)).
>
> Where there was no other evidence against the accused except identification, the court said that there is need for caution in a case where the evidence depended solely on identification evidence.

Now, coming back to the facts of the present appeal, the learned Judge found that PW3 had failed to identify the respondent at an identification parade held just about a week after the alleged incident. Not only that, she also failed to identify the other person who had accompanied the respondent an that day. In her own evidence PW3 admitted that she was not able to identify the respondent at the identification parade although it was held soon after the incident. However, under cross-examination she said she could identify the respondent

in court. Asked further as to how she could identify the respondent in court 1 1/2 years after the incident PW3 replied that she could do so because on that day the respondent was handcuffed.

Based on all these evidence the learned judge found that the manner of identification was totally unsatisfactory. We cannot agree more with the finding of the learned judge. We may add that apart from the evidence of identification there was no other evidence that the learned judge could rely on to irresistibly point to the respondent as the person who had caused the death of the deceased. In our opinion when PW3 rushed from the kitchen to the living room that night she could only have a brief fleeting view of the side of the respondent's face, *albeit* in a well-lit area in the house. That could have been the reason why she could not identify the respondent a week later at the identification parade although she said she was only three feet away from the respondent that night. PW3 admitted that she did not know the respondent before the attack and the attack was all over in a few moments. As a matter of fact, under cross-examination PW3 admitted – "Masa saya nampak mereka melarikan diri, masa adalah singkat sahaja. Hanya dalam sebahagian masa ini sahaja saya nampak muka mereka."

In view of the above evidence, we find that PWS's identification of the respondent in such circumstances cannot be relied upon as it is very unsatisfactory and it is very unsafe to convict the respondent on such evidence. To say the least, her court identification of the respondent is meaningless. In the result, we find that the quality of the identification evidence in this case was very poor and as there is no other supporting evidence to connect the respondent with the alleged murder we can only say that the learned judge was right in holding that the prosecution had failed to prove its case beyond a reasonable doubt. The order of acquittal and discharge by the learned judge is therefore justified.

Our view above finds support in the case of *R v. Turnbull and Others* [1976] 3 All ER where at p. 550 the English Court of Appeal held:

> Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However, where in the opinion of the Judge the quality of the identifying is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification.

We shall now move on to the evidence of PW5 (the son of the deceased). At the time of giving evidence PW5 was 13 years old. PW5 in his examination-in-chief asserted that on the date in question, at about 9.30pm, he was in the living room with his father, the deceased, watching television. His sisters (aged 10 and 4 respectively) were with them. Suddenly two men came into the house. One of them used a bicycle that was in the living room to prevent him from moving. The other assaulted his father with a crash helmet on the head three times. By the second hit, his father fainted and by the time he received the third blow the deceased had fallen to the floor. According to PW 5 both persons were in the house about three minutes. He was about 1 meter away from them. He said he could see their faces. However at the identification parade PW5 could not identify anybody.

Under cross-examination PW5 once again admitted that he could not identify both the persons at the identification parade. He never saw them before the incident. He could not see anyone resembling the respondent at the identification parade. But when asked how he managed to identify the respondent in court during the proceedings PW5 replied that the respondent's hair is now longer and has a moustache. This is strange for it was pointed out to PW5 that the respondent in the dock is without moustache. PW5 agreed.

At the time of giving evidence, PW5 was 13 years old. That puts him at only 11 1/2 years old at the time of the incident. In dealing with the evidence of a child of tender years, the Court of Appeal in *Chao Chong & Ors. v. Public Prosecutor* [1960] 26 MLJ held:

> The evidence of a child must be regarded with suspicion because it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination. Juries should be invited to consider their own experience in connection with stories told by children. It is not sufficient merely to observe that there is a risk in acting on the uncorroborated evidence of a child. It is a sound rule of practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

The Federal Court in dealing with the same issue in *Loo Chuan Huat v. Public Prosecutor* [1971] 2 MLJ 167 had this to say (at p. 168):

> The rule is that the jury must be warned that it is unsafe to act on the evidence of a child unless it is corroborated in material particulars implicating the accused. The leading English case of *Rex v. Baskerville* (i) has often been cited on the meaning of corroboration. We quote the following well-known passage from Baskerville's case (at page 667):

> ... We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only evidence that a crime has been committed but also that the prisoner committed it. (see also *Tham Kai Yau & Ors. v. Public Prosecutor* [1977] I MLJ 174).

On the available evidence before him the learned judge found that there was no corroboration to the evidence of PW5. Both PW5 and PW8 (respondents' friend) were at the scene of the alleged incident. But according to PW8 when he entered the house a struggle ensued between the deceased and the respondent. However PW5 in his evidence did not mention of any struggle between the deceased and the respondent. According to him upon entering the house the respondent straight away attacked the deceased. According to the learned judge PW8's evidence had in fact contradicted PW5's evidence rather than corroborating it. We agree with the learned judge. The next thing to consider is whether there is corroboration of PW5's evidence by the evidence of PW3 (his mother). According to PW3 when she rushed to the living room from the kitchen the deceased was already lying on the floor. When the attack took place PW3 was actually in the kitchen. As such PW3's evidence could not in any way corroborate PW5's evidence. That being the case the learned judge found as a fact that the evidence of PW5 was never corroborated. It would therefore be unsafe for the learned judge to act on the uncorroborated evidence of PW5.

We shall now turn to the evidence of PW8. As we have mentioned earlier the learned judge found that there was a contradiction in the evidence of PW5 and PW8 regarding the struggle between the deceased and the respondent. Next there was another contradiction with respect to the time of the alleged incident. According to PW8 he went to the deceased's house with the respondent at 11pm on that day. But PW3 and PW5 said the assault took place at 9pm All three were prosecution witnesses. The learned judge was in doubt as to which witness was telling the truth. These contradictions have raised doubts in the mind of the learned judge. That led to his conclusion that the prosecution had failed to prove its case beyond a reasonable doubt.

Based on all the available evidence before the learned judge and the reasons we have mentioned above, we would uphold the learned judges' decision. In the result this appeal is dismissed.

My learned brother Mokhtar bin Haji Sidin JCA had seen this judgment in draft and agreed with it. My learned brother Abdul Aziz b. Mohamad JCA had written a dissenting judgment.

Abdul Aziz Mohamad JCA (dissenting):

This was the public prosecutor's appeal against the acquittal by the High Court of the respondent of the murder of Nedusulian a/l Katherason. The offence was alleged to have been committed on 22 March 2000 at 9.20pm at a house in Taman Buntung Jaya, Ipoh, where Nedusulian lived with his wife, a son and two daughters. The respondent was acquitted at the close of the case for the prosecution on the ground that the prosecution had failed to prove the charge beyond reasonable doubt.

Since the main ground in the petition of appeal was that the judge had failed to weigh the prosecution evidence in its totality, I shall set out the relevant evidence.

The main eye-witness to the incident was Nedusulian's son, Rickneshvaran, who was eleven years and seven months old at the time of the incident and thirteen years old when he gave evidence. His evidence was this. When his father came home at 9.20pm on 22 March 2000, his father told him to go and keep his, Rickneshvaran's, bicycle in Rickneshvaran's room. His father then sat down on a sofa in the sitting room to watch television. Suddenly two men hurriedly entered the room from outside the house. One of them blocked Rickneshvaran's movement by standing in front of his bicycle, while the other, after removing the crash helmet that he was wearing, hit his father in rapid succession three times, first on the head from behind while his father was sitting on the sofa, then on the face, when his father turned to look but fainted, and the third time on the head when his father had fallen down on the floor. His sister Malini (Malanidevi), then aged about nine years old, was, or had been, crying loudly. His mother rushed in from the kitchen and tried to prevent the man who had hit his father and who was now kicking him. The man used harsh language on his father and left.

The evidence of the mother, Kolan Demeri, was this. Her husband arrived home at 9.20pm and parked his car in the porch. She told her child – she did not say which – to lock the gate while she prepared food. While she was in the kitchen she heard her daughter crying and her husband's voice. Thinking that he was beating her, she went to prevent it. When she reached the sitting room she saw her husband lying on the floor unconscious near a sofa, being kicked several times by a man who was holding a crash helmet and who was shouting the while. He wore long hair, a moustache and a slight beard. There was

another man in the room who was just standing by. After kicking her husband, the first man put on his crash helmet and left. She ran to the house of a neighbour for help.

Nedusulian died in the hospital next morning. The investigation officer at that stage, Inspector Koay, was informed of it at 5.50am. The post-mortem revealed that death was caused by a hard blunt object. Apart from injuries to the head, the forensic expert who conducted the post-mortem found bruising in the region of the eyes of the deceased. In the sitting room at the time of the incident, his wife had noticed that both eyes were blue. Inspector Koay, when he examined the deceased before the post-mortem, also noticed that both the deceased's eyes were bruised. I mention the injury in the region of the eyes in reference to the testimony of Rickneshvaran that the man had hit his father both on the head and in the face.

The respondent surrendered himself to the police. He was brought to ASP Ariffin three days after the incident, on 25 March 2000 at 4pm. ASP Ariffin noticed a wound on one of his hands, for which he was referred to the General Hospital. There was no evidence as to how or when the respondent received the wound.

An identification parade was subsequently held, but both Kolan Demeri and her son Rickneshvaran were unable to identify the respondent as the person who had attacked Nedusulian. Apparently in the identification parade the respondent was not sporting long hair, a moustache or a beard.

The judge concluded his judgment with the following words: "Without convincing evidence linking or connecting the accused with the causing of the death of the deceased I am of the view that the accused should not be called upon to make his defence". That was the only reason, or the main reason, why the judge did not call for the defence. Although both Kolan Demeri and her son identified the respondent in court, their identification was rejected, rightly in the case of Kolan Demeri because her identification had been influenced by the fact that the respondent was in handcuffs.

As for the son, the respondent's counsel had submitted that the evidence of a child must be regarded with suspicion, the submission being directed mainly to the evidence of identification, as to which the judge said: "With these discrepancies and contradiction corroboration (if any) of material facts to the evidence of (the son) that it was the accused who caused the death of his father is of little probative value".

The judge had earlier mentioned two contradictions or discrepancies, as he called them. One was this. After referring to the son's failure to identify the respondent at the identification parade, the judge said: "But when asked how he managed to identify the accused in court during this *(sic)* proceedings, (the son) replied that the accused's hair is now longer and has a moustache. This is strange for it was pointed out to this child witness that the accused in the dock is without moustache. To this, (he) agreed". According to the notes, however, what the witness said in examination-in-chief was: "Saya boleh cam OKT kerana rambutnya telah panjang sedikit dan dia ada sedikit misaim *(sic)*. Oleh begitu saya boleh camnya". In cross-examination he said: "Juga bersetuju dia tidak berjanggut. Dia ada bermisai sedikit sekarang". What the witness in effect was saying was that he now recognized the respondent because his hair was now longer and he now had a slight moustache. Judging by the notes, it was not the case that the witness agreed that the respondent now had no moustache. What he did agree was that the respondent now had no beard, but it was not by the existence of a beard that the witness could now recognize the respondent. It will be recalled that according to Kolan Demeri the man who attacked her husband wore a slight beard. The presence or absence of a slight beard would not change the appearance of a man as would a moustache and long hair.

But even if the reason given by the son for being able to identify the respondent in court was not sound, there was the evidence of another witness, who was not cross-examined at all by the defence, that the judge ought to have accepted as proof that it was the respondent who attacked Nedusulian. The witness was Vicnesvaran a/l Suppiah, a cattle-breeder, on the basis of whose evidence it was that the judge found the second discrepancy or contradiction in the son's evidence that led him to conclude that his identification in court of the respondent was unreliable.

This was what Vicnesvaran said in evidence, or what the prosecution was able to elicit from him. On the day in question, 22 March 2000, the respondent brought him to meet a friend of the respondent's at the friend's house. The time given by the witness, according to the notes, was "1", but according to the judge it was 11pm. So the time had been mistyped. They went on the respondent's motor-cycle, both wearing crash helmets. Arrived at the house, he waited outside while the respondent went inside it. He did not notice whether the respondent was wearing a crash helmet when he went inside. Hearing the sound as of something falling, he too went inside the house. He saw the respondent and Nedusulian "sedang memukul sama lain", that is, hitting each other. The two children were crying and he tried to coax them out of crying. Soon after, Nedusulian's wife arrived, and he went out of the house. The witness said that Rickneshvaran was not one of the children whom he saw in

the house, so that his evidence in effect was that Rickneshvaran was not there. Later on, and it must have been in answer to further questions about what happened in the house, he said:

> Selepas saya masuk ke rumah itu OKT dan tuan rumah sedang bergelut. Itu sahaja yang saya nampak kerana saya tumpukan perhatian ke atas kedua-dua kanak-kanak yang sedang menangis. Selain pergelutan saya tak ingat apa-apa lagi … Pergelutan yang saya nampak adalah mereka bergelut dengan tangan. Saya tidak lihat apa-apa yang digunakan. Saya pasti perkara ini. Saya tidak nampak siapa menggunakan apa-apa alat.

Finally he said he did not know what became of Nedusulian.

There were two aspects to this witness's evidence. One was the fact of his going to the house with the respondent and of the respondent being the person who had a physical engagement with Nedusulian. The other aspect was the nature of the engagement, what happened during it and what the consequence of it was.

If the judge had accepted this witness's evidence as to the first aspect, it should have constituted for him proof to the hilt of the identity of the man who the son and the mother said hit and kicked Nedusulian. The judge did not say that he did not accept the witness's evidence in that respect, but he did not find that it served to connect the respondent with the incident related by the son and mother. This was what he said:

> It is relevant to note that in (Vicnesvaran's) testimony, he said that he and the accused went to a house on the day in question at 11 p.m. This was not the time of the assault as insisted on by (Kolan Demeri and Rickneshvaran). These two said it was within 9pm. Who then is telling the truth, particularly when all three are prosecution witnesses? **It is possible that what (Vicnesvaran) witnessed was a completely different incident from what (Kolan Demeri and Rickneshvaran) were talking about**. Such doubts certainly provide no corroboration for the child witness or to (Kolan Demeri). (emphasis added).

There was no possibility of "a completely different incident" having the same pattern as that related by the son and wife, who said that it happened at 9.20pm. Inspector Koay said that he was informed at 10.35pm of the incident and of the victim's being in the General Hospital. Nothing further could have happened to Nedusulian at his house at 11pm because by then he was already in hospital. The time 11pm stated by the witness was wrong. The judge should not have entertained the possibility of a completely different incident and should have accepted the witness's testimony as complete evidence linking the respondent to what happened to Nedusulian.

As to the second aspect of the witness Vicnesvaran's evidence, the judge should have realized that the witness was a person who had an interest in not telling the truth if it was prejudicial to the respondent, because he was a friend of the respondent's and was involved in accompanying him when he went to carry out his purpose at Nedusulian's house. His evidence bore the characteristics of the evidence of such a person. Here was a witness who said that he went inside the house because he heard the sound of a fall, and he saw the respondent and Nedusulian "bergelut dengan tangan" but saw nothing else because – how caring of him and how convenient for him! – he was giving his attention to consoling the two crying children. He was obviously not telling the truth about the most crucial matter, and his evidence as to that, and as to peripheral matters, such as that the son was not there, that he did not notice whether the respondent was wearing his crash helmet when he went into the house, and that he saw no one using any instrument, ought not to have been given any consideration. As Raja Azlan Shah FJ observed in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 15 at p. 19 E-F (right):

> There is no rule of law that the testimony of a witness must either be believed entirely or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

Yet the judge used this witness's evidence as the second point of discrepancy or contradiction to render the son's evidence linking the respondent to the incident that led to Nedusulian's death unreliable. This was what he said:

> Then there is contradiction to the evidence of (Vicnesvaran) who said that there was a struggle between the accused and the occupant of the house when (Vicnesvaran) entered the living room. This is not what was disclosed by (Rickneshvaran) who claimed that the accused came straight into the house and hit his father three times on the head with a crashed *(sic)* helmet. There was no mention of any struggle between the men.

Apart from identification, the judge had doubts as to the cause of death. This was what he said:

> On the caused *(sic)* of death, the pathologist has testified that the deceased died of a fractured skull caused by anything that was blunt and hard. Without the production of the crashed *(sic)* helmet which is said to have caused the deceased skull to fracture opens speculation that it is possible that the deceased had fallen onto the floor, which was hard, and broke his skull?

The corollary would be that if the crash helmet had been produced, there would have been no room for speculation that Nedusulian broke his skull by falling on the floor. I thought that the question of production of the crash helmet was a separate and distinct question from the possibility of sustaining a broken skull by falling on the floor. In view of the forensic expert's report, if the evidence was accepted that Nedusulian was hit on the head with a crash helmet, then it must be accepted that the injury to the skull was so caused, because a crash helmet is a hard blunt object, notwithstanding that one was not produced. In entertaining the possibility of the skull being fractured by contact with the floor in a fall, the judge must have been influenced by the witness Vicnesvaran's evidence of a struggle with hands, and not so much by the non-production of the crash helmet. If that witness's evidence was to be allowed to exercise such an influence, it could do so even if the crash helmet was produced. But as I said his evidence ought not to have been taken into consideration. He was not telling the truth. He made up the story of the struggle with hands and left it hanging and uncompleted for the court to fill the ending with the probability that the struggle with hands had resulted in Nedusulian falling on the floor and fracturing his skull.

On the other hand, a boy of eleven plus is perfectly capable of observing correctly such an incident as he related, of remembering it and of relating it in court when he is thirteen. According to the judge, the respondent's counsel "emphasized that the evidence of a child must be regarded with suspicion because it is a matter of common knowledge that children at times find it difficult to distinguished *(sic)* between reality and fantasy". It did not appear from his judgment that the judge had any doubt as to the son's presence in the sitting room at the time of the incident. If he did at all regard the son's evidence with suspicion, it was his evidence as to what happened at that time. And it did not appear that his suspicion was that the son was intentionally not telling the truth, that is to say, that he was lying. If at all he suspected the truth of the son's evidence, it must have been on a consideration – the fantasy consideration – that the son, because he was a child, might have perceived things that were not actually happening. It was, to my mind, an unwarranted consideration. The kind of incident that the boy Rickneshvaran related was not, considering the circumstances, the kind of incident that is produced by the action of fantasy on an ordinary child's mind from some other incident. No ordinary child of eleven would witness at close quarters in clear light a man falling on the floor in a hand-to-hand struggle with another man and form a picture in his mind that the fallen man has instead been, on a sudden and repeatedly, struck on the head and face with a crash helmet.

The appeal was dismissed on a decision of the majority of the court after hearing the submission of the Deputy Public Prosecutor, without, that is, hearing the submission of the respondent's counsel. I therefore did not have the benefit of knowing what counsel would have argued in resisting the appeal and supporting the decision of the judge. But for the reasons that I have given, after hearing only the submission of the DPP, I was of the view that the appeal ought to be allowed.